

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
NICHOLAS R. DOMAN :
for Redetermination of a Deficiency or for :
Refund of New York City Personal Income Tax :
under Chapter 46, Title T of the New York City :
Administrative Code for the Years 1982 and 1983. :

DETERMINATION
ON REMAND
DTA NOS. 805521
AND 805520

In the Matter of the Petition :
of :
KATHARINE B. DOMAN :
for Redetermination of a Deficiency or for :
Refund of New York City Personal Income Tax :
under Chapter 46, Title T of the New York City :
Administrative Code for the Years 1982 and 1983. :

Petitioners Nicholas R. Doman and Katharine B. Doman, 73 Nostrand Parkway, Shelter Island, New York 11964, filed petitions for redetermination of deficiencies or for refund of New York City personal income tax under Chapter 46, Title T of the New York City Administrative Code for the years 1982 and 1983.

A hearing was commenced before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on May 31, 1990 at 1:15 P.M., and was continued to conclusion at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on June 14, 1990 at 9:15 A.M., with all briefs submitted by October 1, 1990. Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on March 21, 1991 with respect to the petitions of Nicholas R. Doman and

Katharine B. Doman. The Division of Taxation filed a brief in support of its exception. Petitioners filed a brief in opposition. Oral argument requested by the Division of Taxation was heard on October 10, 1991.

On April 9, 1992, the Tax Appeals Tribunal remanded the matter of Nicholas R. Doman and Katharine B. Doman to the Administrative Law Judge for a resolution of the statutory residence (183-day) issue.

ISSUE

Whether Nicholas R. Doman and Katharine B. Doman have demonstrated that they spent less than 184 days in New York City during the years 1982 and 1983.

FINDINGS OF FACT

The Tax Appeals Tribunal, in its decision prior to the remand of this matter, agreed with the Administrative Law Judge that petitioners established by clear and convincing evidence their intention to change their domicile from New York City to Shelter Island prior to and for the tax years at issue. Thus, the facts presented below will be limited to the issue on remand, i.e., the 183-day issue. From the original determination presented by the Administrative Law Judge, Findings of Fact "18" and "25" are reproduced in part. Findings of Fact "1", "2" and "26", as modified, are reproduced in their entirety. Additional facts noted below are established from the evidence and the testimony taken during the original hearing in this matter.

On February 11, 1987, the Division of Taxation issued four separate notices of deficiency to petitioners, Nicholas and Katharine Doman, indicating additional tax, penalty and interest due as follows:

1982 New York City Personal Income Tax

<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total Amount Due</u>	
Nicholas Doman	\$9,306.80	\$2,363.48	\$3,907.33	\$15,577.61
Katharine Doman	101.84	25.86	42.75	170.45

1983 New York City Personal Income Tax

<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total Amount Due</u>
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Nicholas Doman	\$7,055.96	\$1,357.38	\$2,115.71	\$10,529.05
Katharine Doman	98.22	18.90	29.45	146.57

The notices of deficiency were issued as a result of an audit of petitioners' records which resulted in two statements of personal income tax audit changes dated December 17, 1986 which calculated the taxes described above for 1982 and 1983 and offered the following explanation:

"Change to New York City Domicile [sic] Resident. See 1305 of the State tax code".

During the audit period, Mr. Doman's law firm, The Firm of Nicholas R. Doman, was located at 420 Lexington Avenue, New York City. During that time, petitioner Nicholas Doman worked approximately three days per week at the law firm (former Finding of Fact "18", in part). He was ages 69 and 70 during the years in issue.

According to the tax returns filed for the years in issue, Katharine Doman was a housewife. She had no wage or self-employment income for 1982 or 1983. Her testimony centered around her Shelter Island community affiliations and involvement. Mrs. Doman stated that she frequently remained in Shelter Island when her husband went to New York City and she did not accompany him on each and every trip to Europe. Mrs. Doman stated that she had not maintained a diary as to her whereabouts during these years. However, when questioned about whether she spent more than 183 days in the City Mrs. Doman replied with certainty that she had not.

Petitioners offered the testimony of Jeffrey Silver, a certified public accountant, attorney and tax partner for the Manhattan firm of George R. Funaro and Company, to describe various portions of the audit conducted of petitioners' records (former Finding of Fact "25", in part).

Both Mr. Silver and the Division of Taxation's auditor stated by their testimony that both the domicile residency and the statutory residence (183-day rule) were issues during the audit. Mr. Silver testified that after much discussion regarding petitioners' records, and after going over the diary as well as other prepared schedules, he had come away with the impression that the 183-day rule, which was at one time the focal point of the audit, had been satisfied.

The Division of Taxation's auditor also testified with respect to the circumstances of the audit surrounding the 183-day issue. He indicated that he prepared schedules based on petitioner Nicholas Doman's diary that were subsequently submitted into evidence. The purpose of doing so was to determine the number of days Mr. Doman was inside or outside the City of New York and to determine what days were spent on Shelter Island, as well as outside the State or the country. The auditor stated that in the normal course of business he would request credit card statements, hotel reservation vouchers, passports, airline tickets, telephone bills and anything else that could prove petitioner Nicholas Doman's whereabouts for any particular day in the calendar year. The auditor indicated that with respect to travel days during these years, Mr. Doman had proven that he was out of New York City for the travel days claimed on the schedule and in the diary and according to the schedule provided by Mr. Silver. The auditor indicated that he received a telephone bill for August 1983 and American Express Company receipts. The American Express receipts, however, were related to travel outside of the State and country. With the information petitioner Nicholas Doman did provide, the Division of Taxation's auditor's schedule established that, according to Mr. Doman's diary, in 1982 Mr. Doman had spent 167 days in New York City, 131 days on Shelter Island and 67 days out of the State and/or country. For 1983, the auditor's schedule established that, according to Mr. Doman's diary, Mr. Doman spent 164 days in New York City, 134 days on Shelter Island and 67 days out of the State and/or country.

Although Mr. Doman had proven he was out of the State and/or country for the periods identified as such in his diary, the auditor stated that he did not receive evidence supporting the days on which Mr. Doman claimed to be on Shelter Island, and that this point was still an issue (former Finding of Fact "26", as modified).

Mr. Silver testified that in an attempt to expedite the audit, he prepared a schedule placed in evidence entitled "Summary Diary" for each of the years in issue based on the diary entries. The result of his schedules compared to the auditor's showed the following number of days in each category:

	<u>1982</u>		<u>1983</u>	
	<u>Silver</u>	<u>Auditor</u>	<u>Silver</u>	<u>Auditor</u>
Days in NYC	167	167	166	164
Days on Shelter Island	126	131	133	134
Days out of State	<u>72</u>	<u>67</u>	<u>66</u>	<u>67</u>
	365	365	365	365

The five-day differential in 1982 as represented by Mr. Silver's schedule was a trip to California in November for five days. This was recorded as days on Shelter Island by the auditor. No explanation for this difference was offered by the parties. However, the auditor testified that Mr. Doman had sufficiently proven he was not in New York City for the travel days claimed in the diary and in accordance with the schedule provided by Mr. Silver (see Finding of Fact "7"). The diary made reference to California and Los Angeles during the days in question.

Further facts were adduced from a thorough review by the Administrative Law Judge of the diaries:

(a) The entries appear authentic in nature and the quality of the appointments made by lead pencil give an aged appearance. This fact is supported by Mr. Doman's testimony that the records were prepared contemporaneously with the dates in issue.

(b) The diaries frequently reflect no appointments on Mondays or Fridays, with a designation that petitioner Nicholas Doman had returned home to Shelter Island on the last prior business day. This fact is consistent with Mr. Doman's statement that he worked in the New York City law firm approximately three days per week.

(c) The diary entries taken alone, with no explanation, could not independently place Mr. Doman in New York City on those days. However, both Mr. Silver's schedule and the auditor's schedule, which essentially are in agreement, designate as "NYC days" virtually all days bearing time and name or meeting site designations. Frequently there were several entries for each of those days making reference to individuals, corporations, a court appointment or legal document preparation. At no time did Mr. Doman attribute a day with numerous entries as a "Shelter Island day". Nor did Mr. Silver or the auditor do so in the preparation of their schedules.

(d) The days purportedly spent on Shelter Island were also examined carefully. The auditor established from the diary for 1982 and 1983 that Mr. Doman spent 131 days and 134 days, respectively, on Shelter Island; 80 of those days were Saturdays or Sundays in 1982 and 89 were the same in 1983.

CONCLUSIONS OF LAW

A. During the years at issue, Article 30 of the Tax Law enabled the City of New York to enact a personal income tax for such years. New York City enacted Chapter 46, Title T of the Administrative Code of the City of New York (hereinafter "Administrative Code") which imposed New York City personal income tax on residents of New York City during these years.

Administrative Code former § T46-105.0 provides the definition of "city resident individual", in relevant part, as follows:

"(a) A city resident individual means an individual:

(1) who is domiciled in this city, unless (A) he maintains no permanent place of abode in this city, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this city, or...

(2) who is not domiciled in this city but maintains a permanent place of abode in this city and spends in the aggregate more than one hundred eighty-three days of the taxable year in this city, unless such individual is in active service in the armed forces of the United States."

B. Administrative Code former § T46-105.0(a)(1) and (2) corresponds to Tax Law former § 1305(a)(1) and (2), referred to throughout the hearing. The application of Administrative Code former § T46-105.0(a)(2), as it refers to petitioners, would require a finding that petitioners were not domiciled in New York City as was affirmed by the Tax Appeals Tribunal (Matter of Nicholas R. Doman and Katharine B. Doman, April 9, 1992), but were residents as a result of having spent more than 183 days of the taxable year in the City. This section has commonly been referred to as statutory residency. Regulations of the Finance Administrator of the City of New York at 20 NYCRR Appendix 20, § 1-2(c) provide as follows:

"Rules for days within and without the City. -- In counting the number of days spent within and without this City, presence within the City for any part of a

calendar day constitutes a day spent within the City except that such presence within the City may be disregarded if it is solely for the purpose of boarding a plane, ship, train or bus for travel to a destination outside of the City, or while traveling by motor, plane or train through the City to a destination outside the City. Any person domiciled outside the City who maintains a permanent place of abode within the City during any taxable year and claims to be a nonresident must keep and have available for examination by the Finance Administrator adequate records to substantiate the fact that he did not spend more than 183 days of such taxable year within the City."

C. The governing regulations do not describe in any detail what constitutes adequate records to substantiate a "negative fact". The negative fact petitioner Nicholas Doman is mandated to prove in this case is that he stayed at his home on Shelter Island or elsewhere for the days he allegedly was not present in New York City. The auditor testified that regarding travel days out of the State and country, Mr. Doman had proven by virtue of his diary entries and documentation of expenses for such trips that he was not in New York City on those days. Thus, the issue in this matter centered around whether there was an appropriate attribution of days to New York City in accordance with the testimony and evidence presented.

D. Having satisfied the travel days, those which the auditor designated as "other" days, petitioner submitted his diary which, in accordance with the schedule prepared by his representative, indicates days he spent at various locations. The result of Mr. Silver's schedule, a day-by-day analysis, is reproduced above in Finding of Fact "8". Having reviewed that schedule and the diary, the auditor prepared a separate schedule. The number of days in each of the categories was established by the auditor in his workpapers and presented as evidence in this matter. Those numbers were not referred to as preliminary totals or subtotals. The Division, during its audit, sought further documentation from petitioner to assess the credibility of the schedule prepared by his representative and the diary information. Although each and every day spent on Shelter Island was not accounted for, the credibility of Mr. Doman's records was established to some degree by his presentation to the auditor of appropriate documentation supporting his days out of the State and country. Mr. Silver testified, after much discussion about the records presented to the auditor and Mr. Doman's habit of life, he was left with the impression that the auditor abandoned the 183-day rule as a basis for the assessment in this

matter. It was his belief that what was presented to the Division had satisfied the auditor's request and the mandate on petitioners to substantiate the fact that they did not spend more than 183 days in New York City during any given year. The Statement of Audit Adjustment issued at the conclusion of the audit did not make reference to a basis for the assessment other than "domicile".

E. Nicholas Doman was ages 69 and 70 during the years in issue. He testified that he was performing legal services for a firm in New York City approximately three days per week. In fact, 167 or 166 divided by 52 weeks yields 3.2 days per week. As with the testimony provided in the segment of Mr. Doman's case dealing with domicile, his testimony regarding this issue was credible as well. The diaries submitted into evidence appeared to be contemporaneous recordings of appointments, meetings and tasks that were performed by Mr. Doman. Travel days out of the State and out of the country were substantiated to the satisfaction of the auditor in accordance with diary markings and expense itemizations. Consistent with a finding of domicile, 80 to 90 days of the days Mr. Doman claims to have been on Shelter Island were weekends.

F. In Matter of Sutton (Tax Appeals Tribunal, October 11, 1990), the Tribunal found that telephone bills in petitioner's name revealing outgoing calls from petitioner's Florida condominium over a period of 10 and 11 months during the years in issue in that matter, as well as petitioner's testimony, provided a sufficient basis to conclude that petitioner was not present in New York for greater than 183 days. The key in Sutton was not an overwhelming abundance of evidence but rather that the evidence corroborated petitioner's testimony sufficient to carry the burden of proof.

G. Petitioners were under an obligation to maintain adequate records to substantiate the fact that they did not spend more than 183 days of each taxable year within the State (Smith v. State Tax Commn., 68 AD2d 993, 414 NYS2d 803, citing 20 NYCRR 102.2[c]). The essential records presented by petitioner Nicholas Doman were the daily diaries containing appointment entries for the years in issue. The diaries were accompanied by expense records to substantiate

days out of New York and the country, as well as summary schedules intended to further explain Mr. Doman's whereabouts by identifying his location for each day where it might not otherwise be obvious from an entry. Petitioner's credible testimony in conjunction with the evidence submitted in this matter support a finding that adequate records existed to substantiate the fact that petitioner Nicholas Doman did not spend more than 183 days of each taxable year within New York City.

H. Mrs. Doman did not maintain a diary to prove her whereabouts during the years in issue. However, given her status as a homemaker, her testimony, credible beyond reproach, as to her habit of life vis-a-vis her husband, her community involvement, and civic activities, Katharine Doman met her burden of proving she did not spend more than 183 days in New York City during the years in issue.

I. The petitions of Nicholas and Katharine Doman are granted and the notices of deficiency dated February 11, 1987 are hereby cancelled in their entirety.

DATED: Troy, New York
May 28, 1992

/s/ Catherine M. Bennett
ADMINISTRATIVE LAW JUDGE